certain limits and for debts due by the deceased at the time of his death, but that an allowance shall not be paid—

(*a*) "for debts incurred by the deceased, unless such debts were incurred *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit, or

(*b*) "for any debt in respect whereof there is a right to reimbursement from any other estate or person, unless such reimbursement cannot be obtained.

It is in my opinion clear from the provisions of this section that no allowance can be made in this case for such part of either the debt due on the charge or to the bank which was not incurred wholly for the deceased's own benefit. I am of opinion, however, that the provisions of the second proviso to section 6 do not preclude the Collector from enquiring into and ascertaining what debts were in fact due by the deceased at the time of his death, and I am of opinion that the Collector was correct in making an allowance to that extent in his assessment. A point has been raised by Mr. Shearn upon the omission of the words "and incumbrances," which appear in the equivalent section of the Finance Act, 1894, Section 7 (i), from section 17 (i) of the local Enactment. It appears to me that the reason for this is that the term "incumbrances" is not employed in the Land Code and that the Legislature in confining the scope of the section to funeral expenses and debts thereby intended the inclusion of charges in the word "debts." I am fortified in this view by the definition of "property" in section 2 (xi) of the Estate Duty Enactment which refers to debts secured on moveable or immoveable property. I am unable to accept the contention that from the omission of the words "and incumbrances" in section 17 (i) the inference should be drawn that sums due on charges should reduced from the principal value of the property passing and are not debts of which an allowance should be made under section 17.

For all these reasons I would allow this appeal and uphold the assessment of $357,696.69. The appellants should, in my opinion, have the costs of this appeal but not the costs of the hearing before Thorne, Ag. C.J., thus the costs paid by the Collector should be repaid and the deposit should be paid out to the appellants.

Appeal allowed.

Solicitors for Plaintiff–Respondent—

Pooley & Co.

Solicitors for Defendants-Appellants—

Lovelace & Hastings.

[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C.J.

April 13, 1933.

THE MOTOR EMPORIUM .....Appellant.

vs.

V. ARUMUGAM.....Respondent.

[SELANGOR MAGISTRATE'S CIVIL APPEAL No. 13 of 1933]

Attachment of property in custody of a public officer—Government contract—Assignment of benefit of contract to third party—Civil Procedure Code, 1918, sections 265, 273—Application of equitable principles—Courts Enactment, 1918, section 49 (i).

An execution creditor can only attach an interest in property to which, at the time of the attachment, the debtor was beneficially entitled.

By a letter in writing dated the 17th September, 1932, and stamped as an assignment, a judgment-debtor, (a contractor), assigned his rights to the respondent to draw $390/- from the Public Works Department, Klang. Meanwhile the appellant obtained judgment against the judgment-debtor and, in pursuance of that judgment, served a prohibitory order, obtained under section 273 of the Civil Procedure Code, on the Senior Executive Engineer, Klang on the 26th October, 1932, in respect of the $390/-.

Held, that when the judgment-debtor executed the assignment of the 17th September 1932, purporting to transfer his interest in the $390/- to the respondent, he had, in fact, transferred such interest and accordingly nothing remained for the appellant to attach.

Although there is no Civil Law Enactment incorporating into the law of the Federated Malay States the equitable principles applied in England, yet under the provisions of section 49 (i) of the Courts Enactment, the Supreme Court has the widest possible jurisdiction in all suits matters and questions of a civil nature, and has inherent jurisdiction to apply such principles of natural justice as are necessary or desirable.

R. Ramani for the appellant.

A. J. Bostock Hill for the respondent.

Cur. Ad. Vult.

TERRELL, AG. C.J.—In this case, Kanagasabhai the second defendant entered into a contract with the Public Works Department to supply certain granite blocks in connection with the work being carried out upon the Mosque at Klang. The contract is not disputed, and is evidenced by an indent (exhibit B) dated the 15th September, 1932. The amount payable to the second defendant on supplying the granite was $390/–.

By a letter in writing dated 17th September, 1932 (exhibit A) and stamped as an assignment, the second defendant, in consideration of $150/–, assigned to the plaintiff his right under the indent, and authorised him to draw the $390/– from the office of the Public Works Department, Klang.

Meanwhile, on some date which is not specified in the pleadings, the Motor Emporium, the first defendants, obtained a judgment against the second defendant in Telok Datoh Civil Suit 70/32 for $149.99. This judgment was confirmed on

appeal by the Supreme Court in Kuala Lumpur on the 30th September, 1932.

Having obtained confirmation of this judgment, the first defendants thereupon sought to obtain execution. They knew of the $390/–, which was shortly to become payable to the second defendant, and proceeded to attach it. Presumably they did not know about exhibit A.

Now the property they wanted to attach was money in the hands of a public officer, namely, the Senior Executive Engineer, and accordingly, the provisions of section 273 of the Civil Procedure Code, apply. This section says that:—

> "when the property to be attached is in the custody of any Court or Public Officer, the attachment shall be made by a notice to such Court or Officer requesting that such property .....may be held subject to the further orders of the Court from which the notice issues."

The notice referred to in the section has the same effect as a prohibitory order (see form No. 141 in the schedule to the Civil Procedure Code). In the case of property in the hands of a public officer in his official capacity, the second proviso to the section declares that such property shall not be attached, unless the consent of the Resident or Secretary to the Resident is produced in Court.

In pursuance of the provisions of this section, the first defendants, the decree holders in the Telok Anson suit, had the suit transferred to Klang for execution, and applied by the letter on the 4th October, 1932 to the Secretary to the Resident for his consent.

According to the grounds of judgment, the Secretary to the Resident delayed considerably in replying, and it was not until the 24th October that the first defendants filed their application for execution. Neither the consent of the Secretary to the Resident, nor the application for attachment, nor the prohibitory order, were before the Court, and the record to this extent is defective, but it is agreed between the parties that the prohibitory order cannot have been made before the 24th October, 1932. On the 26th October the order was served on the Senior Executive Engineer, Klang.

In the meantime, both parties had given written notice to the Senior Executive Engineer, Klang, of their respective claims, the plaintiff on the 14th October, 1932 and the defendant on the 20th October, 1932. I do not think that these notices affected the legal rights of the parties in any way, though the result was that the Senior Executive Engineer, having notice of the rival claims, quite correctly availed himself of the provisions of section 269 (iii) to pay the money into Court.

Reduced to their simplest compass, the facts are that the plaintiff claims the money in the hands of the Senior Executive Engineer and now in Court, by virtue of the document executed on the 17th September, 1932, and the first defendants claim the same moneys in virtue of the prohibitory order of the 24th October, 1932 by which the same moneys were attached.

The rights of the parties are governed by section 265(i) of the Civil Procedure Code, the material parts of which read as follows:—

> "The following property is liable to attachment and sale in execution of a decree—namely .....and except as hereafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment-debtor or over which or the profits of which he has a disposing power which he may exercise for his own benefit, and whether the sum be held in the name of the judgment-debtor or by another person in trust for him and on his behalf."

It follows from this that the only property liable to attachment is property in which the judgment debtor has a beneficial interest. If he has parted with such beneficial interest, the property is not attachable, and it makes no difference whether the property is held by the debtor himself or by a third person on his behalf.

It should be mentioned that the words of the section quoted above are identical with the words of section 617 of the Civil Procedure Code of the Colony, which sets out what property may be seized under a writ of seizure and sale.

There is ample authority for the proposition that an execution creditor can only attach an interest to which, at the time of the attachment, the debtor was beneficially entitled. It has been so held in the Federated Malay States, *Boase* v. *Cluny Rubber Estates Ltd.*, 2 F.M.S.L.R. 130 and in the Colony, *Ng Boo Bee* v. *Khaw Joo Choe* 14 S.S.L.R. 90. Both these were Court of Appeal decisions. It was also so held by Thorne J. in Johore—(Batu Pahat Civil Suit No. 76/30). In Johore the provisions of the Federated Malay States Civil Procedure Code apply, and though the Court of Appeal reversed his decision, it was on a question of procedure only, and on the merits, the Court (Sproule, Ag. C.J. S.S., and Simpson J.) agreed with the learned trial Judge—(see Malayan Law Journal vol. 2 page 48, February 1933). I myself followed the same principle in a more recent case in Singapore, *Yeo Chiang Swee* v. *United Decorators*, 2 Malayan Law Journal 85. The same principle has been applied in England—*Pickering* v. *Ilfracombe Railway Co.*, (1868) 3 C.P.C. 235. and in India, see 8 Bombay High Court Reports, (Original Civil Jurisdiction) pages 169 and 179, where it is pointed out that an attaching creditor is not in the position of an assignee for value without notice—he can only attach what the judgment debtor has.

The only question, therefore, that remains is whether the judgment debtor had parted with his beneficial interest or not. On this point considerable argument was adduced in the Court below as to whether in the Federated Malay States contracts are assignable, whether the contract was the sort of contract which could be assigned, whether English principles of equity as to assignment of contracts apply, whether such contract

was assignable at Common Law before the passing of the Judicature Act, and finally the extent to which principles of equity apply in the Courts of the Federated Malay States. It is not surprising that the learned Magistrate found himself in considerable doubt and difficulty in being asked to decide a plethora of abstract legal questions, most of which have, in my opinion, no relevancy whatever to the issue before the Court.

To begin with, the contract between the second defendant and the Public Works Department for the supply of granite was not assigned. To a certain extent it was a personal contract and incapable of assignment, and indeed the plaintiff has never suggested that the contract was assigned. All that he says is that under the agreement of the 17th September he became entitled to receive the moneys payable by the Public Works Department to the second defendant.

Then again, no question of the special provisions of section 25 (6) of the Judicature Act 1873 (now repealed and re-enacted by section 136 of the Law of Property Act 1925) apply at all. This section enables an absolute assignee of a debt or chose in action, after giving notice to the debtor, to exercise the same remedies for recovering the debt as was possessed by the assignor, and to give a good discharge for the debt. The same provision is enacted in section 4 (6) of Ordinance No. 111 (Civil Law) of the Colony. The section principally affects procedure, as under the Common Law, before the Judicature Act, the assignee could always join with the assignor in suing for the debt, and the assignor could be compelled to lend his name for that purpose.

But a sufficient reason why a consideration of this branch of the law is quite irrelevant, is that, apart from there being no assignment of the contract for the supply of granite, no question whatever arises in this case between the assignee i.e. the plaintiff and the debtor i.e. the Public Works Department.

The first defendants' argument is, therefore, narrowed down to this, namely, that under the law of the Federated Malay States the second defendant was unable for some reason or other to transfer to the plaintiff the right to receive the moneys payable to him by the Public Works Department, under the contract for the supply of granite.

Now, it is quite impossible to say that such a transfer is tainted with illegality, on the ground that it is contrary to public policy, or that it is in conflict with direct statutory provision. Mr. Ramani did indeed argue that certain sections of the Contract Act, namely, sections 37, 62 and 63 were exhaustive, and that as they did not deal with the transfer of a chose in action, such a transfer must inferentially be treated as prohibited. But these sections deal with performance and novation of the contracts themselves, and do not touch the assignment or transfer of the benefits arising under a contract, and it has always been the view of the Courts in India that such benefits can be assigned in accordance with the principles of the English law, there being no provision on the subject in the Indian Contract Act (see Kanjilal, Law of Contract, page 377).

Exhibit A is, what would be called in England, an equitable assignment of a chose in action, i.e. of the right to receive payment of the moneys due by the Public Works Department to the contractor, as soon as the contract has been performed. It is said that the English rules of equity, as administered by the Court of Chancery, have no application in the Federated Malay States, as the Court has not been given the jurisdiction of the Court of Chancery, nor is there any Civil Law Enactment incorporating into the law of the Federated Malay States the equitable principles applied in England. This is perfectly true so far as it goes, but under section 49 (i) of the Courts Enactment, the Supreme Court has the widest possible jurisdiction in all suits, matters and questions of a civil nature, and although the legislature has given no indication on what principles such jurisdiction should be exercised, every Court must have inherent jurisdiction to do justice between the parties, and apply such principles as are necessary or desirable for attaining such object, and for giving decisions which are in conformity with the requirements of the social conditions of the community where the law is administered. Looked at in this light, it would hardly be reasonable to exclude in the Federated Malay States a principle of natural justice merely because a not less civilised community, namely England, has adopted such a principle as part of its recognised legal system. On the contrary, it is a cogent reason for adopting the same principle in the Federated Malay States.

The Courts of the Federated Malay States have on many occasions acted on equitable principles, not because English rules of equity apply, but because such rules happen to conform to the principles of natural justice. In the case of *Boase* v. *Cluny Rubber Estates Ltd.*, 2 F.M.S.L.R. 130, at page 140, Edmonds, J., says:—

> "In any community where the social conditions are not of the simplest, trusts are necessarily of common occurrence. In commercial communities especially, transactions are commonly conducted on the footing that the parties can repose confidence on each other and need not provide complicated and troublesome records of such transactions. Informal trust transactions with respect to land in which the money lenders are concerned are very numerous in Kuala Lumpur. It is essential, in my opinion, that the local Courts should recognise and afford protection to equitable interests so created."

With this statement of the law I respectfully agree.

In the present case, as the attaching creditor is in no better position than the second defendant, the assignor of the chose in action, it must be argued that, notwithstanding the fact that the second defendant set his hand to exhibit A, and received valuable consideration therefor, the law of the Federated Malay States is such that he can still claim beneficially the interest under the contract with which he has purported to part. Such a proposition need only to be stated to be rejected, quite apart from the fact that the second defendant does not, for one moment dispute that he has parted with all his interest. If the second defendant had fraudulently attempted to claim the interest which he had assigned for valuable consideration, he would in all probability have brought himself within the provisions of the Penal Code. I have no doubt then, that it is in accordance with the principles of elementary justice, as well as consonant with common sense, to hold that, when the second defendant executed a document purporting to transfer his interests in the moneys payable by the Public Works Department to the plaintiff, and when he admitted before the Court that he had no further interest himself, he had in fact transferred such interest. Accordingly there was nothing for the judgment creditor to attach.

In my view, therefore, the judgment of the learned Magistrate was right, and the appeal must be dismissed with costs.

Appeal dismissed.

[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C.J.

June 10, 1933.

MARIAN REBELLO
P. A. PERIES ... **Defendants-Appellants**

vs.

HARBANS SINGH ..... **Plaintiff-Respondent**

[SELANGOR CIVIL APPEAL No. 18 of 1932]

Evidence—Promissory note—Signatories signing as sureties—Evidence Ordinance, section 92.

When a promissory note is signed by several signatories promising to pay "jointly and severally," it is not open to any of the signatories, by virtue of the provisions of section 92 of the Evidence Ordinance, to allege that they signed as sureties. Any agreement that they should be treated as sureties is not collateral to the promissory note, but in direct contradiction of it, and therefore inadmissible in evidence.

S.K.R.S.L. Somasundram Chetty v. *Lim Ham Kai*, (1927) S.S.L.R. 64, followed.

Raman Chetty v. *Sarkies*, (1929) S.S.L.R. 128, not followed.

R. Ramani and *K. K. Benjamin* for the appellants.

G. Terrell for the respondent.

Cur. Ad. Vult.

TERRELL, AG. C.J.—The claim in this case was for $990 on a promissory note signed by all the defendants in favour of the plaintiff, and on which they were jointly and severally liable. The promissory note was dated the 31st October, 1931. On the 2nd November, 1931, the 1st defendant gave a bill of sale on his office effects in favour of the 3rd defendant and the plaintiff, to secure the sum of $980. It is said that the difference in the amount was a clerical error. Whether this was so or not, there can be little doubt that the bill of sale was to secure the same debt as was secured by the promissory note. This bill of sale was executed without the knowledge of the 2nd defendant, who did not hear of it till a month later. After giving his evidence in chief, and after having been cross-examined on behalf of the 2nd defendant, the 1st defendant consented to judgment, and the case was then adjourned. Shortly afterwards the 1st defendant left the country and was never cross-examined by the plaintiff or the 3rd defendant.

The main defence of the 2nd and 3rd defendants was that, although signing as principals they were in fact to the knowledge of the plaintiff sureties, and that he accepted them as such. If they were sureties, it was contended that the execution of the bill of sale varied the original contract, and also gave time to the principal debtor, and accordingly that the sureties were discharged. The 2nd and 3rd defendants also alleged misrepresentation, and merger of the original contract, the promissory note, in the contract evidenced by the bill of sale.

The learned trial Judge gave no decision on the question whether it was competent for the 2nd and 3rd defendants to allege that they were sureties, in view of section 92 of the Evidence Ordinance, but he found that the promissory note could only be varied by a binding contract and that, as he was satisfied that the bill of sale was not a binding contract, it was not open to the 2nd and 3rd defendants to rely on it, and that accordingly their defence failed whether they were sureties or not. On the issue of misrepresensation, he found against both defendants on the facts. He also decided against the defendants on the issue of merger, on the ground that a valid contract cannot be merged in a void contract. Accordingly, judgment was entered for the plaintiff for the amount claimed less a sum of $200, which the trial Judge found had been paid to the plaintiff by or on behalf of the defendants after the promissory note had been signed.

On the appeal the 2nd and 3rd defendants put forward the same arguments, except that the issue of merger was abandoned. They also put forward an argument based on section 222 of the Civil Procedure Code, which declares that every agreement to give time for the satisfaction of a judgment debt shall be void unless made for consideration and with the sanction of the Court.